No. 222.

Brief of Henson for

Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 222.

GEORGE S. WILLIAMS, PLAINTIFF IN ERROR,

vs.

C. E. WINGO.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

GEORGE S. WILLIAMS, Plaintiff in Error,

vs.

C. E. WINGO, Defendant in Error.

In Error from the Supreme Court of Appeals of the State of Virginia.

BRIEF FOR PLAINTIFF IN ERROR.

The petition on pages 17, 18 and 19 of the printed record contains a concise statement of the case, and presents the questions involved as succinctly as we are able to present them.

The questions arising under the constitution of the United States were raised in the State courts, as appears on pages 8 and 16 of the record.

The petition on page 19 specifies the errors relied on, and which are intended to be urged.

The State statutes which are involved are also copied in the petition, pages 17 and 18.

The petition is asked to be read and considered as a part of this brief.

We claim :

I. That the right to operate a ferry is a franchise.

" Franchises are special privileges conferred by governments upon individuals, and which do not belong to the citizens of the country generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held where it is not derived from a law of the State."

Bank of Augusta vs. Earle, 13 Peters, 595.

" It is a conceded power or duty of government to provide and maintain highways, bridges, ferries, . . . and in various other ways to make provisions for the comfort and convenience of the public. When these duties are not directly assumed by the government they may be delegated.

"But the inducement to others to undertake them must usually be some such consideration as the grant of more or less exclusive privileges. While no rule of law demands it, they are usually conferred upon corporations."

8 Am. & Eng. Ency. of Law, pp. 585–6. Franchises.

"The parties respectively assumed, and so the court below held, that the establishment and regulation of ferries across navigable streams is a subject within the control of the government, and not matter of private right; and that the government may exercise its powers by *contracting* with *individuals*. We deem this general principle not open to controversy."

Mills vs. St. Clair Co., 8. How. 581.

"Such a franchise is the creation of the sovereign power, and no one can exercise it without the consent of the State."

Miss. River Bridge Co. vs. Lonergan, 91 Ill., 513.

II. "The franchise being a contract between the State and the citizen, the rights granted to the citizen cannot be taken away unless the State reserved the power to take them away."

Dartmouth College vs. Woodward, 4 Wheat., 415, and the many cases which follow it.

This court declared a charter to a gas company to be "a contract between the State and its corporators, and within the provisions of the constitution prohibiting legislation impairing the obligations of contracts, and therefore equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators."

N. O. Gas Co. vs. Louisiana Light Co., 115 U. S. 660.

The case last cited (see page 665) recognizes the right of a State to grant the exclusive privilege to conduct a ferry, or to do any work for the public which the State might undertake to perform.

If the foregoing principles are sound, it only remains to show:

III. That the State granted the exclusive privilege to Geo.

S. Williams, the petitioner, to operate a ferry within the territory in which the courts of Giles county have authorized C. E. Wingo to establish one.

That Mr. Wingo's ferry is within one-half mile of petitioner's ferry is not disputed. The distance is one-third of a mile. Testimony of James Hoge, page 13.

By chapter 64, Codes of 1849 and 1873, and chapter 62, Code of 1887, the legislature conferred upon the courts the power of granting ferry privileges. No other power but the legislature could grant them.

When Mr. Williams obtained his franchise in 1880 it was with a distinct legislative declaration, which was a part of the same act and chapter which authorized the court to grant it, that no court should grant leave to establish another ferry within half a mile of his; and that if any person, without authority lawfully acquired prior to May 1, 1840, should exercise the rights, or perform the duties of a ferryman within one-half mile of his, he (Williams) should have the right to recover $200 for each month his privileges were encroached upon.

It was upon the faith of this legislative agreement that he expended his money, in preparing and maintaining the landings and the boat, and keeping the necessary laborers, and that he for eighteen years performed the duties to the public which his franchise imposed upon him.

If no court could grant the leave, there was no power which could do so, unless the legislature itself had that power. A person might very well be willing to assume a duty, for privileges which the legislature alone could revoke, and be entirely unwilling to do so if they could be revoked by a county or circuit judge, at any term of the court and under local influences and prejudices, which would not and could not operate upon the legislature.

A legislative committee might, we believe would, have taken a very different view of the evidence, in this case, from that taken by the trial judge. Again, the increased expense and difficulty of getting witnesses before a committee of the legislature, the longer time between the sessions of the legislature than between those of courts, the greater number of persons to

deliberate upon and to decide the question, are all sources of security to such a franchise.

No one can read chapter 63 of the Code of Virginia without feeling that a person obtaining a ferry franchise thereunder, would believe that he was obtaining an exclusive privilege within the half-mile limit, and that he could safely invest his money and labor on that belief.

The Act of March 5, 1894, not only violates the spirit of the Code, but the very letter. "No court," says the Code, "shall grant leave to establish a ferry." "It shall be lawful," says the Act of March 5, 1894, "for the county court of Giles county to establish a ferry."

Argument cannot make this contradiction any plainer.

Section 1376 is not only a contract, that the courts shall not be empowered to grant a rival ferry within half a mile, but it is also a contract that the legislature will protect the enjoyment by requiring every one who keeps a rival ferry, or does the equivalent thereof, who prior to May 1, 1840, had not obtained legal authority so to do, to pay to the proprietor of the legally authorized ferry two hundred dollars per month.

The latter clause of the section applies to all persons who did not have authority prior to May 1, 1840. It contains no exception in favor or those who might get authority after May 1, 1840. Its terms apply to those who might receive a legislative grant of the franchise after 1840, and makes such an one equally with one who keeps a ferry without the semblance of authority, liable to the proprietor of the ferry established by the court, for two hundred dollars per month.

The State has no interest in the two hundred dollars forfeit. In granting the ferry franchise, the State, as a part thereof and for the same consideration, granted the right to the forfeit, which thereby became a vested and valuable right of private property, which the State could not, by any of its departments, nor all combined, take away without making compensation.

The Act of March, 1894, takes away the right of action for the forfeit, and provides no compensation therefor. That the legislature granted such a right, raises a very strong implication that it intended to make the privilege exclusive, and to deprive

itself of the power of establishing another ferry within the half-mile limit.

Is it possible that the legislature intended to reserve to itself the right to do a thing which it was prohibiting by a penalty as heavy as two hundred dollars per month?

In the State courts the defendant in error relied on these words in the case of Somerville vs. Wimbish, 7 Grattan, p. 231:

"It is true that by the Act of 1840 [which is now Section 1386 Code], in order to prevent injurious competition, the courts are prohibited from granting leave thereafter to establish a ferry over any water-course within one-half mile, in a direct line, of any ferry legally established over the same water-course. But if that prohibition embraces opposite ferries, as to which we express no opinion, it was no surrender of the legislative power to establish such opposite ferries, whether directly or through the agency of the courts."

To this we reply:

That case in no way involved the question of contract. There was no pretence that an exclusive privilege was granted with the Somerville ferry; on the contrary, the Act under which it was established contained an express provision that it should be lawful for the county court to constitute opposite ferries. That ferry was established seventy years before the act of 1840, and as Judge Baldwin truly said, contained no surrender of the legislative power over the subject, because the subject was not protected by the sanctity of a contract.

As the question whether or not the grant of a ferry after the passage of the Act of 1840 conferred a privilege which the courts could not be authorized to take away was not before the court, it is not to be presumed that Judge Baldwin was speaking to that question.

We respectfully submit that the judgment complained of should be reversed.

HENSON & MASON.
PHLEGAR & JOHNSON.